Supreme Court, U.S.

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF PLACER,

Petitioner,

vs.

YOVANA GUTOWSKY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

I. Does a 42 U.S.C. § 1983 employment discrimination cause of action accrue at the time of the discriminatory act?

II. Does the "continuing violation" doctrine used in Title VII[1] claims extend the accrual date for a 42 U.S.C. § 1983 *Monell*[2] employment discrimination action to last day of employment, particularly when the last act of alleged discrimination did not fall within the limitations period?

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1. 42 U.S.C. § 2000e, *et seq.*

2. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, County of Placer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 F.3d 256, and is reproduced in the appendix filed herewith (App. B, 3a-16a). Petitioner filed a petition for rehearing with suggestion for rehearing en banc on March 20, 1997. The order denying the petition was issued by the Court of Appeals on April 17, 1997, and is reproduced in the Appendix filed herewith at (App. A, 1a-2a). The order after hearing of the District Court is reproduced in the Appendix at (App. E, 25a-26a).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision, 42 U.S.C. § 1983, is set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent brought an action alleging civil rights violations pursuant to 42 U.S.C. § 1983 (hereinafter "§ 1983"). The complaint made no Title VII claims. Respondent claimed sexual harassment and gender discrimination in her complaint, which named the County of Placer as the sole defendant. The complaint made no claim of wrongful termination. Respondent's complaint purported to state a cause of action for relief alleging equal protection violations pursuant to the Fourteenth Amendment of the United States Constitution and provisions of the California Constitution. Respondent further alleged a violation of her due process rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and provisions of the California Constitution.

Following discovery, Petitioner County of Placer, brought a motion for summary judgment, which was granted and a subsequent judgment entered in favor of the County. The District Court found all of Respondent's claims to be time barred. (E.R.[3] p. 474). Respondent appealed the District Court's ruling on the gender discrimination claim only, and did not appeal the court's ruling on her sexual harassment claim. (Brief of Respondent, p. 4). On appeal the Ninth Circuit Court of Appeals reversed on the grounds the continuing violation doctrine extended the accrual date of plaintiff's § 1983 cause of action to her last day of employment. The district court had found plaintiff's complaint to be seventeen (17) months late.

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3. Petitioner will use Respondent's designation of "E.R." to reference the Excerpt of Record on Appeal filed by Respondent in the court of appeals.

Gutowsky became a County employee in the Department of Public Works in March of 1982. After a temporary job, she became the permanent, full time employee in the position of communications clerk, for the Department of Public Works Road Division, Tahoe office. Gutowsky held the position she remained in until May 26, 1993, when she left work and did not return. Gutowsky filed her complaint on May 24, 1994. (E.R. p. 1).

Gutowsky claims to have made repeated requests to promote to position as a road maintenance worker or equipment operator. The communications clerk position was not a promotional position, (E.R. p. 122, ls. 11-24), and in order for Gutowsky to obtain either a road maintenance job or equipment operator job, she would be required to file an application, undergo the examination process, and be placed on an eligible list, all pursuant to the County's Civil Service Commission rules which have been in place in the County since well before Gutowsky became a County employee. (E.R. p. 123, ls. 5-26). Gutowsky never submitted an application to become either a road maintenance worker or an equipment operator for the County of Placer whether in the Lake Tahoe area or otherwise. (E.R. p. 469).

Gutowsky contends she was discriminated against in not being placed in an equipment operator or road maintenance worker position. She further contends that males were hired or promoted into these positions.

REASONS FOR GRANTING THE WRIT

This court should grant the writ for two reasons:

First, the Ninth Circuit decision conflicts with the relevant decisions of this court. *Chardon v. Fernandez*, 454 U.S. 6, 70 L.

Ed. 2d 6, 102 S. Ct. 28 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 571, 97 S. Ct. 1885 (1977). The decision establishes the date of accrual for § 1983 employment discrimination claim differently than that for any other § 1983 claim.

Second, there is a split of authority between the Federal Circuit Courts of Appeal and confusion within the circuits on the important Federal question of whether the Title VII continuing violation doctrine is applicable to a § 1983 employment discrimination action. If so, does the continuing violation doctrine extend the accrual date to the last day of employment when the last act of alleged discrimination did not fall within the limitations period. The Ninth Circuit held that the accrual date for such an action is extended to the last day of employment notwithstanding the fact that the complaint was filed seventeen (17) months after the expiration of the statute of limitations for the last discriminatory act (which occurred twenty nine (29) months before the complaint was filed).

I.

DOES A 42 U.S.C. § 1983 EMPLOYMENT DISCRIMINATION CAUSE OF ACTION ACCRUE AT THE TIME OF THE DISCRIMINATORY ACT?

Section 1983 actions are characterized as personal injury actions for purposes of identifying the applicable statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 276, 105 S. Ct. 1938 (1985). Thus, § 1983 actions must be brought within the time specified by the forum state's statute of limitations for personal injury torts. In California, the applicable statute of limitations is Cal. Civ. Proc. Code Sec. 340(3), which provides for a limitations period of one year from the date the cause of action accrues.

Federal law determines when a cause of action accrues and the statute of limitations begins to run for a § 1983 claim. *McDougal v. County of Imperial,* 942 F.2d 668, 672 (9th Cir. 1991); *Norco Construction, Inc. v. King County,* 801 F.2d 1143, 1145 (9th Cir. 1986); *Compton v. Ide,* 732 F.2d 1424, 1432 (9th Cir. 1984). A federal claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Norco v. King, supra,* at 1145, quoting *Trotter v. International Longshoreman's Warehousemens' Union,* 704 F.2d 1141, 1143 (9th Cir. 1983).

As with any other § 1983 claim, it is the discriminatory act and the knowledge on the part of the plaintiff which serves as the basis for identifying when the federal claim accrues for a § 1983 employment discrimination claim. As recently as 1994, the Ninth Circuit Court of Appeals held that the commencement of the limitations period for a civil rights action occurs upon notice. In *McCoy v. San Francisco City and County,* 14 F.3d 28, 29 (9th Cir. 1994), the Ninth Circuit cited *Hoesterey v. City of Catheral City,* 945 F.2d 317 (9th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S. Ct. 1941, 118 L. Ed. 546 (1992), for the proposition that the touchstone for determining the commencement of the limitations period is notice. Thus, "the cause of action generally accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Hoesterey v. City of Catheral City,* at 319. As the District Court pointed out, in applying this standard to the present case, plaintiff's claim was filed 17 months late where the accrual date was the date of the last discriminatory act.

The Ninth Circuit decision to extend the accrual date of a § 1983 employment discrimination cause of action is contrary to this court's decisions in *Chardon v. Fernandez,* 454 U.S. 6, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981) (limitations period applicable to employment discrimination action under 42 U.S.C. § 1983

held to run from time of notice that appointment would terminate rather than from termination date), *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980) (the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful, *id.* at 258, "mere continuity of employment, without more is insufficient to prolong the life of a cause of action for employment discrimination" *Id.*, at 257), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 571, 97 S. Ct. 1885 (1977) (a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. *Id.* at 558.)

This Court made clear in *Chardon*, and *Evans* that the focus is upon the last act of discrimination as the date of accrual of the cause of action. The Ninth Circuit has disregarded this Court's decisions and instead substituted the last day of employment as the date of accrual regardless of when the last discriminatory act occurred. Such an approach may be appropriate if a wrongful termination claim was being made, but no such claim was being made here. This important federal question of the date of accrual of a § 1983 employment discrimination cause of action requires clarification at this time for the benefit of all of the federal circuits and litigants.

II.

DOES THE "CONTINUING VIOLATION" DOCTRINE USED IN TITLE VII CLAIMS EXTEND THE ACCRUAL DATE FOR A 42 U.S.C. § 1983 *MONELL* EMPLOYMENT DISCRIMINATION ACTION TO LAST DAY OF EMPLOYMENT, PARTICULARLY WHEN THE LAST ACT OF ALLEGED DISCRIMINATION DID NOT FALL WITHIN THE LIMITATIONS PERIOD?

There is great deal of disparity in the treatment given to the "continuing violation" doctrine among the circuits. The circuit courts have differed over whether the continuing violation doctrine is applicable to actions of this type and how it should be applied. Courts finding that the doctrine is applicable because the mere existence of a policy constitutes a continuing violation include *McKenzie v. Sawyer,* 684 F.2d 62, 72 (D.C. Cir. 1982); *Perez v. Laredo Junior College,* 706 F.2d 731 (5th Cir. 1983) and *Williams v. Owens Illinois, Inc.,* 665 F.2d 918, 924 (9th Cir. 1982), *cert. denied,* 459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1983). Circuits finding otherwise and basically concluding that § 1983 actions accrue when a plaintiff should be aware of the injury and its connection to the acts of the defendants include *Association Against Discrimination and Employment, Inc. v. City of Bridgeport,* 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied,* 455 U.S. 988, 102 S. Ct. 1611, 71 L. Ed. 2d 847 (1982); *Acha v. Beam,* 570 F.2d 57, 65 (2d Cir. 1978) and *Lavelle v. Listi,* 611 F.2d 1129, 1131 (5th Cir. 1980).

In *Lavelle v. Listi, supra,* the Fifth Circuit held "a cause of action under § 1983 accrues when 'the plaintiff is, or should be, aware of both the injury and the connection with the acts of the defendant.' " *Id.* at 1131. The Sixth Circuit is in accord and in *Dixon v. Anderson,* 921 F.2d 212, 215 (6th Cir. 1991) stated "in determining when the cause of action accrues in § 1983 actions,

we have looked to what event should have alerted a typical lay person to protect his or her rights." *Id.* at 215.

The Tenth Circuit appears to have held both ways in the same case. In *Pike v. City of Mission,* 731 F.2d 655 (10th Cir. 1984), the court said that challenging a systematic policy is not barred since the policy continues to violate the employee's rights, "however, plaintiff may not use the continuing violation theory to challenge discrete acts that occur outside the limitations period even though the impact of the act is continued to be felt." *Pike v. City of Mission,* 731 F.2d at 660 (10th Cir. 1984). This confusion has lead to inconsistent results, a problem, which needs to be rectified by guidance from this Court.

It is the execution of the policy inflicting injury which plaintiff must show in a § 1983 action rather than simply alleging that a policy of discrimination exists. In analyzing respondent's claim, the Ninth Circuit treated this § 1983 claim for employment discrimination as if it were a Title VII claim. The court stated:

> As in a Title VII claim, a policy or practice of continuing discrimination is under attack in a § 1983 claim for *employment discrimination.*

Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997) (App. C, 13a) (emphasis added). The court missed a significant distinction in terms of the nature of a § 1983 *Monell* action. *Monell* made clear that it is an "execution of a government's policy or custom . . . that inflicts the injury" which gives rise to the liability not the mere existence of the policy. Without the application of a policy to cause injury to a plaintiff, there is no § 1983 violation.

The mere existence of a policy without an application

(discrimination act) does not trigger any statute since the mere existence of the policy is not a § 1983 violation. The Ninth Circuit correctly pointed out that it is the execution of the policy causing injury which is a critical part of a *Monell* claim. Despite this, the court went on to state that without applying the continuing violation doctrine, the accrual of the cause of action would be uncertain. The court stated:

> If the continuing violation doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. *Id.*

This statement demonstrates the Ninth Circuit's failure to recognize the fundamental difference between a § 1983 *Monell* action where the government policy or custom is executed to inflict injury, and a Title VII claim where the mere existence of a policy may be a basis for a claim.

It is not difficult at all to ascertain exactly when a claim accrues under a § 1983 *Monell* action for it is simply the date on which a discriminatory act took place. Gutowsky claimed that the execution of the policy against her consisted of statements by supervisors which she felt were degrading to her by reference to her job or gender. She also felt that the policy was executed in terms of her being denied the right to use County equipment to practice in preparation to take a State test for a job which she did not currently hold and for which she never applied. There were, in fact, discrete acts of discrimination which would have advised a lay person of their cause of action in this case. As the District Court found, none of these acts fell within the limitations period. The court's claim of uncertainty

as to the date of accrual does not lead to the conclusion that the continuing violation doctrine should be applied to § 1983 actions.

In its explanation of its ruling, the District Court found that plaintiff had alleged specific discriminatory acts none of which fell within the limitations period. The District Court found:

> [P]laintiff's complaint filed May 24, 1994 is 17 months late. Plaintiff attempts to revive her claim relying upon testimony of one Peter Caravella who replaced Compton as a supervisor. Plaintiff testified that after he was no longer plaintiff's supervisor Compton continued to make derogatory remarks about women through at least May of 1993. However, these remarks were made to Caravella, and there is no evidence presented to show that plaintiff was present or over heard these remarks, or that they contributed in any way to a hostile work environment so pervasive that it altered the condition of plaintiff's own employment.

(App. D, 21a).

The District Court went on to point out:

> [A]s the Supreme Court stated in *Ricks* and the Ninth Circuit *London* cases cited by defendant teach, her complaint which purports to rely on a continuing civil rights violation theory, as does plaintiff here, the statute of limitations begin to run on the last discriminatory act and not on the date the

> consequences of that act are felt. Here, the last date on which plaintiff worked with and was subject to derogatory remarks from her supervisor, Compton, was in December of 1991. Therefore, the last discriminatory act of sexual harassment directed towards plaintiff occurred on that date.

(App. D, 21a).

In contrast, the Ninth Circuit focused not on the discrete acts of discrimination but on the alleged existence of some policy or practice as supporting application of the "continuing violation" doctrine to this § 1983 case. Contrary to the Ninth Circuit's conclusion, a § 1983 claim for employment discrimination is not the same as a Title VII claim and the continuing violations doctrine is not applicable to § 1983 *Monell.* A specific execution of the policy causing injury must be the basis of the *Monell* action rather than merely the existence of a policy without its application to a particular individual to cause injury.

Under this Court's decisions, a cause of action accrues when the discriminatory act occurs and when plaintiff knows or reason to know of the injury which is the basis of the action. The accrual of the cause of action is not extended or tolled to the last date of employment when there is no actionable conduct at that time such as a wrongful termination claim. The allegation of the existence of a discriminatory policy in violation of the Constitution does not impact the accrual date for discrete discriminatory acts giving rise to a § 1983 employment discrimination cause of action. To hold otherwise would unreasonably extend the accrual of a Section 1983 employment discrimination cause of action to the last day of employment regardless of the number of years between the last discriminatory act and the last date of employment.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 17, 1997

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-16850

D.C. No. CV-94-00818-EJG

YOVANA GUTOWSKY,

Plaintiff-Appellant,

v.

COUNTY OF PLACER,

Defendant-Appellee.

ORDER

Before: LAY,* GOODWIN and SCHROEDER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc, and Judges Lay and Goodwin so recommend.

The full court has been advised of the suggestion for

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16850

CT/AG#: CV-94-00818-EJG

YOVANA GUTOWSKY

Plaintiff - Appellant

v.

COUNTY OF PLACER

Defendant - Appellee

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED.

Filed and entered March 6, 1997

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 6, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

YOVANA GUTOWSKY,
Plaintiff-Appellant,

v.

COUNTY OF PLACER,
Defendant-Appellee.

No. 95-16850

D.C. No. CV-94-00818-EJG

OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
January 14, 1997—San Francisco, California

Filed March 6, 1997

Before: Donald P. Lay,* Alfred T. Goodwin and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Labor and Employment/Employment Discrimination

The court of appeals reversed a judgment of the district court. The court held that in an employment-discrimination claim under 42 U.S.C. § 1983, the date of termination starts the running of the statute of limitations on an employee's con-

*Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

stitutional claim based on a government entity's ongoing policy of gender discrimination in employment.

When she went to work as a clerk for appellee County of Placer in 1982, appellant Yovana Gutowsky had a Bachelor of Science degree. Gotowsky wanted to become an equipment operator, but under California law, she needed a commercial driver's license. Despite her repeated requests for permission to practice on County equipment for her commercial license test over a period of over ten years, Gutowsky's supervisors either refused or failed to grant it. They cited County policy, did nothing, noted that she was a "mere woman," or laughed. One supervisor said that it was "ridiculous" when Gutowsky passed the written test for a commercial license.

During the same period, less-qualified male employees were promoted over Gutowsky after securing commercial drivers' licenses on County time. Gutowsky never submitted an application for a position as road-maintenance worker because she believed that management's attitude made an application by a woman futile. Gutowsky was never promoted despite consistent and outstanding performance evaluations. She resigned on May 26, 1993.

On May 24, 1994, Gutowsky filed an action against the County under 42 U.S.C. § 1983, alleging gender discrimination in employment in violation of the equal protection and due process clauses of the Fourteenth Amendment.

On the County's motion for summary judgment, Gutowsky's evidence included 67 rejected applications by women that included the road maintenance position. She also submitted evidence that no woman had ever been hired for a full-time position in that field. The district court ruled that Gutowsky's action was timed-barred because she did not bring it within one year of the last alleged act of discrimination.

Appendix C

On appeal, Gutowsky contended that the "continuing violations" doctrine applied, and that the one-year period of the governing statute of limitations did not commence until the day she left her employment. She asserted that the County's widespread policy and practices of discrimination continued every day of her employment, including days that fell within the limitations period.

[1] The County suggested no cogent reasons why the "continuing violations" doctrine used in Title VII claims should not be applied in § 1983 cases. [2] A plaintiff in a Title VII action who alleges a policy or practice of systematic discrimination may in certain circumstances utilize the continuing violations doctrine. This is because the employer's discriminatory policy continually deters the employee from seeking full employment rights, or threatens to adversely affect the employee in the future.

[3] As in a Title VII claim, a policy or practice of continuing employment discrimination is under attack in a § 1983 claim for employment discrimination. In order to sue a municipality under § 1983, a plaintiff must show execution of a government's policy or custom that inflicts the injury. If the continuing violations doctrine were inapplicable, it would be difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. The continuing violations doctrine therefore applied.

[4] Gutowsky had to show a series of related acts, one or more of which fell within the limitations period, or the maintenance of a discriminatory system both before and during that period. A continuing violation may be established through a series of related acts against one individual, or by a systematic policy or practice of discrimination.

[5] Gutowsky's motion papers were replete with evidence of an ongoing practice and policy that denied opportunity to

women to move into the equipment-operating positions. [6] Gutowsky presented specific examples of discrimination that were not the basis of her charge of discrimination, but evidence that a *policy* of discrimination pervaded her employer's personnel decisions. [7] The County ignored the portions of Gutowsky's claim of explicit experiences of discrimination that were a continuing pattern of discriminatory action in its promotion and placement procedures, and that these practices and procedures were in place during the entire period of Gutowsky's employment.

[8] A material question of fact was presented by Gutowsky's pleadings and proffer. A trier of fact could have found that the County's discrimination against women as equipment operators continued up to and including the last day Gutowsky worked. Her claim was timely.

[9] A plaintiff need not apply for a job if the application would have been futile. In such an instance, the plaintiff must show that he or she was a potential victim of unlawful discrimination, and establish that he or she would have applied for the job had it not been for the discriminatory practices. [10] A jury could have believed from Gutowsky's evidence that her application would have been futile. A triable issue of fact was also supported by evidence demonstrating that she was continually rebuffed in her attempts to practice on County equipment in order to obtain her commercial driver's license.

COUNSEL

Cindy L. Robbins, Mackenroth, Ryan, Jacobson & Fong, Sacramento, California, for the plaintiff-appellant.

Cris C. Vaughan, Deputy Placer County Counsel, Auburn, California, for the defendant-appellee.

Appendix C

OPINION

GOODWIN, Circuit Judge:

Yovana Gutowsky appeals the summary judgment granted in favor of defendant-appellee County of Placer. The district court found that Gutowsky's claims under 42 U.S.C. § 1983 were time-barred because they were not brought within the one-year limitation period applicable to such claims. Gutowsky challenges this ruling, asserting that because the discriminatory policies and practices were continuous violations throughout her County employment, the limitation period did not begin to run until the day she quit her job. We reverse and remand.

Factual and Procedural Background

Gutowsky was hired in March of 1982 by the County of Placer Department of Public Works, Road Division, as a communications clerk. Her duties in that position included answering phones, dispatching road crews, collecting fees, doing radio work and handling payroll. Gutowsky was so employed for ten years; and although her duties increased, she was never promoted. Gutowsky claims that discriminatory policies and practices in the County's hiring and promotional procedures denied her an equal opportunity to advance in her employment.[1]

---

[1]Gutowsky's First Amended Complaint for Damages alleges:

8. At all times mentioned herein, the COUNTY OF PLACER, DEPARTMENT OF PUBLIC WORKS, had a policy, practice, and/or custom to employ gender-based criteria in hiring, assigning, promoting, and disciplining staff in the ROADS [sic] DIVISION, specifically at the Tahoe location in Placer County, and to deny employment and advancement to women. Pursuant to this policy, practice or custom, among other actions, the COUNTY precluded females from obtaining permits to operate ROADS DIVISION equipment, thereby limiting the tasks performed by female employees, including plaintiff, within a male-dominated department.

Appendix C

Gutowsky wanted to become an equipment operator, but under California law, she needed a commercial driver's license. Gutowsky asserts that male road crew workers were allowed to use county equipment to practice for their com-

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. . . .

10. Plaintiff alleges that it was the policy, practice and/or custom of the COUNTY to promote and otherwise ensure the career advancement of less qualified male employees by assisting them in obtaining their Class I licenses for operating ROADS DIVISION equipment, where these same opportunities were not provided to better qualified female employees, including plaintiff.

. . . .

A. Discriminatory hiring and promotion practices

Plaintiff YOVANA GUTOWSKY holds a Bachelor of Science degree in National Resources and Business Administration. She began working for the COUNTY in PUBLIC WORKS, ROADS DIVISION, at the Tahoe Administration Building in 1982. From that time until the time she was forced to resign in May 1993, she was not given a single promotion despite consistent and outstanding performance evaluations. During this same time period, defendant COUNTY repeatedly hired numerous entry-level male employees as "Equipment Operators." The COUNTY allowed these male employees, who were not college educated, to obtain Class I licenses to operate equipment during their regular working hours.

. . . .

13. Despite plaintiff's repeated requests to obtain her Class I license, defendants, and each of them, declined to allow her to apply for a Class I license on COUNTY time, and repeatedly told plaintiff that she could not operate equipment because she was female.

. . . .

14. Throughout the 11 1/2 years plaintiff was employed with the PUBLIC WORKS ROADS DIVISION, not a single female employee was accepted as an equipment operator, full time, on a promotion track. During the entire 11 1/2 years plaintiff was employed at the ROADS DIVISION in Tahoe, not a single female employee of the ROADS DIVISION was promoted. During this same period of time, numerous male employees with lesser qualifications were promoted, advanced in their careers and offered higher paying jobs at the Auburn facility.

mercial license tests. She "frequently" asked her supervisor Leonard Zick if she could use the County's equipment to practice. In response to her request in 1983, Zick told her that "she could not do it because it was not County policy." That same year, Gutowsky asked the Director of Public Works, John McGowan, for use of the County's equipment. McGowan retired shortly thereafter, and the request "didn't go anywhere." In 1988, Zick transferred out of the Tahoe office and Kenneth Compton became Gutowsky's supervisor. Gutowsky asked Compton if she could use the County's equipment, and he responded that she was "a mere woman and a secretary and a clerk."

In 1991, Gutowsky talked to Assistant Director Jan Witter about using the County's equipment to practice for her commercial driver's license, and in response, he "laughed."

Gutowsky continued to ask Compton, at least once a year during her review time, to use the County's equipment to practice. Meanwhile, Gutowsky actually took and passed the written test for a Class I commercial driver's license. Compton said the fact that Gutowsky had taken the written test was "ridiculous."

Compton was replaced as Gutowsky's supervisor by Pete Caravella in 1992. Gutowsky continued her efforts to obtain permission to use the County's equipment while Caravella was her supervisor. Attempts by Caravella to accommodate Gutowsky's requests to utilize the equipment were rebuffed by Witter. She alleges that Caravella and Compton discussed her request as late as May, 1993, to no avail.

Jim Gray, personnel director for the County, said he was not aware of any women having been hired as full-time road maintenance workers. The reason for this, he states, is that "women have not applied for these jobs." Gutowsky submitted as evidence sixty-seven job applications from women that list "Road Maintenance Worker" as one of the positions for

which they would like to apply. It is apparently undisputed that no woman had ever been hired as a full-time equipment operator or road maintenance worker at the time Gutowsky brought this action.

In order to obtain a position with or to be promoted by Placer County, a person is required to submit an application, undergo an examination process, and be placed on an eligibility list, pursuant to the Civil Service Commission rules of the County. Gutowsky never submitted an application for a position as a road maintenance worker or as an equipment operator with the County. She asserted that she did not submit a formal application because she believed that management's attitude made an application by a woman futile.

Gutowsky's employment with the County of Placer ended on May 26, 1993. This action was filed on May 24, 1994. The district court found that Gutowsky's claim was time-barred because it was not brought within one year from the date of the last discriminatory comments made by Gutowsky's supervisors. The district court granted the County's motion for summary judgment on that basis on August 18, 1995.[2]

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[2]The court stated:

> Again, assuming but not deciding that plaintiff states a claim for intentional discrimination in violation of the 14th Amendment equal protection and due process clauses, her claim is time-barred. Specifically plaintiff maintains that she was discouraged from applying for non-clerical positions as early as 1983, which discouragement continued through 1993, and that she persisted in her attempt to promote to an equipment operator during the time that Caravella was her supervisor in 1992 and 1993, and that her supervisors discussed this matter among themselves as late as, "May, 1993."
>
> However, to the extent that plaintiff relies on statements made by Compton, supervisor to Caravella, that it was plaintiff's job to answer the phones, even assuming that this statement can be considered to be an act of discrimination, plaintiff has failed to demonstrate that such statements were made within the one-year period prior to the filing of the complaint.

Appendix C

Standard of Review

We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law. This court does not weigh the evidence or determine the truth of the matters asserted. We decide only whether there is a genuine issue for trial. *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130-31 (9th Cir. 1994).

Analysis

Gutowsky and the County agree, as do we, that the appropriate limitation period under California law for a Section 1983 claim is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991); Cal. Civ. Proc. Code § 340(3). The parties disagree, however, when the one-year limitation period should commence. Gutowsky argues that the "continuing violations" doctrine applies and that the year began on the date she left her employment. We agree with Gutowsky.

I. The Continuing Violations Doctrine in Section 1983 Claims

[1] Noting the "dearth of authority" regarding the timeliness of a *Monell*[3] employment discrimination suit under Section 1983, Gutowsky argues that the "continuing violations" doctrine used in Title VII claims should be applied in Section 1983 cases. The County suggests no cogent reasons why this should not be the case.

[2] A plaintiff in a Title VII action who alleges a policy or practice of systematic discrimination, as opposed to alleging

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[3]Referencing *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

only individual discriminatory acts, may in certain circumstances utilize the continuing violations doctrine. Under this approach, an action is always timely if brought by a present employee. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761 (9th Cir. 1980) (citation omitted). This is because the employer's discriminatory policy "continually deters the employee from seeking . . . full employment rights or threatens to adversely affect [the employee] in the future." *Id.*

[3] As in a Title VII claim, a policy or practice of continuing discrimination is under attack in a Section 1983 claim for employment discrimination. Indeed, in order to sue a municipality under Section 1983, a plaintiff must show "execution of a government's policy or custom . . . [that] inflicts the injury." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). If the continuing violations doctrine were inapplicable to *Monell* actions, it is difficult to ascertain exactly when such claims would accrue, especially if no specific discriminatory acts evidenced the policy during the year immediately prior to the filing of the lawsuit. Therefore, the continuing violations doctrine is applicable to *Monell* actions.

II. Continuing Violations Doctrine Applied in this Case

[4] To invoke the continuing violations doctrine in her case, Gutowsky must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during [that] period. *Green v. Los Angeles County Superintendent of Schs.*, 883 F.2d 1472, 1480 (9th Cir. 1989) (citations omitted). Thus, a continuing violation may be established through a series of related acts against one individual, or by a systematic policy or practice of discrimination. *Id.*

[5] The County asserts that the doctrine of continuing violations does not apply because Gutowsky offered insufficient evidence of such violations. The County is mistaken. Gutowsky's motion papers were replete with evidence of an

ongoing practice and policy that denied opportunity to women to move into the equipment operating positions.

In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980), we reversed a district court decision in a case in which plaintiff alleged a policy of continuing discriminatory practices. In *Reed*, the district court found that plaintiff had alleged only three instances of discrimination, and held that her claim was time-barred because it had not been filed within the appropriate time period from the date of the last discriminatory instance. *Id.* On appeal, we held that:

> The complaint should not be read so narrowly. Her allegations included a sweeping attack on Lockheed's systems of promotion, compensation and training. She alleged that the violations took place throughout her service at Lockheed and until the day she filed her complaint. . . . [E]ach day without promotion constituted a new violation of Title VII, assuming that similarly situated males were promoted with more regularity.

Id. at 759-60.

[6] Like the *Reed* plaintiff, Gutowsky presents specific examples of discrimination which "are not the basis of her charge of discrimination" but rather "are but evidence that a *policy* of discrimination pervaded [her employer's] personnel decisions." *Id.* at 760. Indeed, Gutowsky contends that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitation period.

[7] The County's theory ignores the portions of Gutowsky's claim of explicit experiences of discrimination that show these to be a continuing pattern of discriminatory action in its promotion and placement procedures; and that these practices and procedures were in place during the entire

period of Gutowsky's employment. The significance of the fact that Gutowsky's name did not appear on an eligibility list in December 1992 is for the trier of fact to consider. The publication of the list did not necessarily signal the end of those practices. Publication of such a list was completely consistent with a policy against putting women in the cabs of snowplows and other heavy equipment.

III. Date of Accrual of the Action

[8] We hold that the doctrine of "continuing violations" applies in this case. A material question of fact is presented by Gutowsky's pleadings and proffer. A trier of fact could find that the County's discrimination against women as equipment operators continued, at least in Gutowsky's area of employment up to and including the last day she worked. Accordingly, her claim, filed within one year of her last day of work was timely.

IV. Effect of Gutowsky's Failure to Apply for the Position

The County claims that Gutowsky's failure to submit an application for the position of road maintenance worker or equipment operator precludes her from maintaining a Section 1983 lawsuit for employment discrimination. The County cites *Tagupa v. Board of Directors*, 633 F.2d 1309 (9th Cir. 1980), for the premise that submission of an application is a necessary element of a Section 1983 claim for wrongful denial of a certain job.

[9] The Supreme Court has held, however, that a plaintiff need not apply for a job if the application would have been futile. *Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 365-68 (1977). In such an instance, the plaintiff must show that he or she "was a potential victim of unlawful discrimination" and, to that end, the plaintiff must establish that he or she "would have applied for the job had it not been

for those [discriminatory] practices." *Id.* at 367-68. While *Teamsters* is a Title VII case, we have recognized the potential for its application in Section 1983 actions. *Tagupa*, 633 F.2d at 1312 n.2 (stating that, because Tagupa brought forth no evidence to indicate that he was discouraged from applying for the job, "he can draw no comfort from the analysis in . . . *Teamsters* . . ., wherein the Supreme Court recognized that circumstances may excuse the requirement that a plaintiff apply for the position").

[10] The County argues that Gutowsky has not submitted any evidence to show that she reasonably believed that submission of an application for the position would be futile. The jury could very well believe from Gutowsky's evidence of sixty-seven applications by women that included the road maintenance position, that her sixty eighth application would have been futile. She also submitted evidence that no woman has ever been hired for a full-time position in that field. A triable issue of fact is also supported by evidence demonstrating that she was continually rebuffed in her attempts to practice on County equipment in order to enable her to obtain her commercial driver's license.

Conclusion

In this case the limitation period began to run on Gutowsky's last day of work for the County. Her claim was not time barred. Triable issues of fact are: (1) Whether the County's management personnel had a policy or custom barring the employment of women as road maintenance workers or equipment operators. (2) Whether an application for a position as an equipment operator would have been futile. On this record, summary judgment was not appropriate.

REVERSED and REMANDED.

APPENDIX D — REPORTER'S TRANSCRIPT, UNITED STATES COURT OF APPEALS, COURT'S RULING ON MOTION FOR SUMMARY JUDGMENT DATED AUGUST 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CV S 94-0818

BEFORE THE HONORABLE EDWARD J. GARCIA, JUDGE

Yovana Gutowsky,

Plaintiff,

vs.

County of Placer,

Defendant.

REPORTER'S TRANSCRIPT

COURT'S RULING ON MOTION FOR SUMMARY JUDGMENT

FRIDAY, AUGUST 18, 1995

Reported by: MARGARET A. McNAMARA, CSR #6729

APPEARANCES

For the Plaintiff:

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MACKENROTH RYAN JACOBSON FONG
1610 Arden Way, Suite 250
Sacramento, California 94815-4032
By: Cindy Robbins, Atty at Law
and
Timothy Ryan, Atty at Law

For the Defendant:

PLACER COUNTY COUNSEL
Placer County Administrative Center
175 Fulweiler Avenue, Room 301
Auburn, California 95603-4581
By: Cris C. Vaughan, Deputy County Counsel

Appendix D

[1] SACRAMENTO, CALIFORNIA
Friday, August 18, 1995, 9:00 A.M.

THE COURT: Civil case number 94-0818, Yovana Gutowsky versus County of Placer, defendant.

MS. ROBBINS: Good morning, your Honor, Cindy Robbins for the plaintiff.

MR. VAUGHAN: Good morning, your Honor, Cris Vaughan on behalf of the defendant, County of Placer.

THE COURT: Mr. Vaughan.

MR. RYAN: Good morning, your Honor, Timothy Ryan on behalf of the plaintiff.

THE COURT: Mr. Ryan.

Give me a minute to review my notes. This matter is on calendar on defendant's motion for summary judgment. Defendant moves for summary judgment on the two causes of action pled which are brought pursuant to Section 1988 of the Civil Rights Act contending that they are one, time-barred, and alternatively that plaintiff has failed to submit evidence of intentional discrimination. I've reviewed the briefs on the matter.

Is there anything you want to add on the motion, Mr. Vaughan, not covered in your briefs?

[2] MR. VAUGHAN: We would submit it, your Honor.

THE COURT: Mr. Ryan or Ms. Robbins, anything to add?

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MS. ROBBINS: Just briefly, your Honor. With respect to the statute of limitations, specifically on the plaintiff's claims of hiring and promotion, in a case cited in the defendant's reply brief, Ninth Circuit *Reese vs. Lockheed Aircraft*, a challenge to systematic discrimination is always timely if it's brought by a present employee. Here the plaintiff brought suit within a year of leaving employment at 762 — page 762 of that case, which is 613 F 2d.

The Ninth Circuit held that when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as he who goes through the motions of submitting an application. The plaintiff's claims are for denial of equal protection and due process. She offers substantial evidence of these claims within the limitations period.

THE COURT: Mr. Vaughan, if you submit the matter I'm going to grant your motion on statute of limitations grounds.

[3] MR. VAUGHAN: Submitted, your Honor.

THE COURT: Section 1983 actions are governed by a one-year statute of limitations. Plaintiff, a Department of Public Works employee of the defendant county, contends that she was subjected to sexual harassment in the form of a hostile work environment and was denied promotional opportunities based on her sex in violation of state and federal constitutional equal protection and procedural due process rights. On the motion plaintiff submits evidence that she was subjected to a hostile working environment during two specific periods of her eleven-year employment with the county.

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First, from 1982 through 1988 she was verbally and physically harassed by her supervisor Leonard Zick, and from 1988 through December of 1991 she was verbally harassed by her supervisor Kenneth Compton. Assuming, without deciding that the conduct complained of constituted actionable sexual harassment and that it was continuous from 1982 through 1991, any Section 1983 action based on this conduct would have had to have been filed no later than December of 1992.

Plaintiff's complaint filed May 24, 1994 is 17 months late. Plaintiff attempts to revive her claim[4] through the testimony of one Peter Caravella, who replaced Kenneth Compton as her supervisor. She testifies that Compton, after he was no longer plaintiff's supervisor, continued to make derogatory remarks about women through at least May of 1993. However, these remarks were made to Caravella, and there is no evidence presented to show that plaintiff was present or overheard these remarks, or that they contributed in any way to a hostile working environment so pervasive that it altered the conditions of plaintiff's employment.

As the Supreme Court *Ricks* and the Ninth Circuit *London* cases cited by defendant teach, for complaints which purport to rely on a continuing civil rights violation theory, as does plaintiff here, the statute of limitations begins to run on the date of the last discriminatory act, and not on the date the consequences of that act are felt. Here the last date on which plaintiff worked with and was subject to derogatory remarks from her supervisor, Compton, was in December of 1991. Therefore the last discriminatory act of sexual harassment directed towards plaintiff occurred on that date.

Defendant's motion for summary judgment on the [5] two

causes of action pled, to the extent they allege section 1983 violations based on sexual harassment, is granted as time-barred. Plaintiff also contends that her 14th Amendment equal protection and due process rights were violated when she was denied, on the basis of her gender, the opportunity to promote to a non-clerical position. The evidence shows that during her employment with the county, plaintiff never completed an application for such a position. Plaintiff contends, however, that that was because she was discouraged from doing so.

Again, assuming but not deciding that plaintiff states a claim for intentional discrimination in violation of the 14th Amendment equal protection and due process clauses, her claim is time-barred. Specifically plaintiff maintains that she was discouraged from applying for non-clerical positions as early as 1983, which discouragement continued through 1993, and that she persisted in her attempt to promote to an equipment operator during the time that Caravella was her supervisor in 1992 and 1993, and that her supervisors discussed this matter among themselves as late as, "May, 1993."

However, to the extent that plaintiff relies [6] on statements made by Compton, supervisor to Caravella, that it was plaintiff's job to answer the phones, even assuming that this statement can be considered to be an act of discrimination, plaintiff has failed to demonstrate that such statements were made within the one-year period prior to the filing of the complaint. Defendant's motion for summary judgment on plaintiff's 14th Amendment claims of equal protection and due process violations based on intentional sexual discrimination in the form of failure to promote is also granted. These claims are also time-barred by Section 1983 one-year statute of limitations. Having granted summary judgment in defendant's favor on the Section

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1983 federal claims which gave this Court its original jurisdiction, I now decline jurisdiction over the purely state constitutional claims pursuant to section 1367(c)(3) of Title 28. With this disposition I do not reach defendant's other bases for the motion. We'll prepare a summary order and direct the clerk to enter final judgment in favor of defendant.

Anything further Mr. Ryan?

MR. RYAN: No, your Honor.

THE COURT: Ms. Robbins?

[7] MS. ROBBINS: No, your Honor.

THE COURT: Mr. Vaughan?

MR. VAUGHAN: No, sir.

THE COURT: All right. Thank you, counsel.

(Whereupon the proceedings were adjourned.)

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[8] REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, MARGARET A. McNAMARA, certify that I was the official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 1 through 7, inclusive, constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court
Eastern District of California

JUDGE: Honorable EDWARD J. GARCIA, Judge

CAUSE: Yovana Gutowsky vs. County of Placer

Case No. CV S 94-0818

DATE: Friday, August 18, 1995

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on the 8th day of September, 1995.

MARGARET A. McNAMARA
CSR No. 6729

APPENDIX E — ORDER AFTER HEARING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED AUGUST 22, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV NO. S-94-0818 EJG/JFM

YOVANA GUTOWSKY,

Plaintiff,

v.

COUNTY OF PLACER,

Defendant.

ORDER AFTER HEARING

This matter was before the court on August 18, 1995, for hearing on defendant's motion for summary judgment. Cindy Robbins and Timothy Ryan appeared on behalf of plaintiff. Chris Vaughan appeared on behalf of defendant. After considering the parties' written and oral arguments and the record in this matter, and for the reasons stated in the court's oral analysis in open court on the record, the court entered the following order.

1. Defendant's motion for summary judgment is granted on the grounds that plaintiff's section 1983 claims are time-barred. The court does not reach defendant's alternative arguments.

2. Having dismissed all claims over which the court has original jurisdiction, the court declines supplemental jurisdiction over the state constitutional claims contained in the complaint and those claims are now dismissed. *See* 28 U.S.C. § 1967(c)(3).

3. The Clerk of Court is directed to enter judgment in favor of defendant.

IT IS SO ORDERED.

Dated: August 18, 1995

s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT